Datuk Wira SM Faisal bin SM Nasimuddin Kamal v Emilia bt Hanafi & Ors

HIGH COURT (SHAH ALAM) — SUIT NO 23CY-3–10 OF 2016
GUNALAN MUNIANDY J
19 MARCH 2018

Civil Procedure — Striking out — Counterclaim — Plaintiff's action struck out — Plaintiff applied to strike out first defendant's counterclaim — Whether relief claimed in first defendant's counterclaim sufficiently connected to subject matter of principal claim — Whether first defendant's counterclaim sustainable in law — Rules of Court 2012 O 15 r 5(2) & O 18 r 19(1)(b), (1)(c), (1)(d)

The plaintiff brought a claim for defamation against the defendants for the distribution of a video clip that went viral following an incident on 20 September 2016 at the Shariah High Court of Kuala Lumpur. The plaintiff's claim had been struck out except for that against the sixth defendant which had been settled. In the same action, the first defendant counterclaimed for assault and battery based on incidents allegedly occurred since 2011. The plaintiff in the present action filed an application ('L 71') to strike out the first defendant's counterclaim pursuant to O 18 r 19(1)(b), (1)(c) and (1)(d) and/or O 15 r 5(2) of the Rules of Court 2012. The issue arose for the court's determination was whether the relief claimed in the first defendant's counterclaim was sufficiently connected with or allied to the subject matter of the principal claim.

Held, allowing the application:

(1) The first and most important point to note was that the principal and the counterclaim arose out of different incidents which were separate and distinct from each other. Likewise, the causes of action and reliefs prayed for were entirely different. Based on the above grounds, the first defendant had clearly failed to demonstrate that her counterclaim in terms of the reliefs claimed and surrounding facts/factual matrix was sufficiently connected to or had material affinity with the principal claim for the counterclaim to be maintained in the same action. Therefore, the first defendant had failed to satisfy the establish test for the present counterclaim to be sustainable in law (see paras 19–20).

[Bahasa Malaysia summary

Plaintif telah memulakkan tuntutan untuk fitnah terhadap defendan-defendan kerana mengedar klip video yang telah menjadi viral berikutan kejadian pada 20 September 2016 di Mahkamah Tinggi Syariah Kuala Lumpur. Tuntutan

A plaintif telah dibatalkan kecuali terhadap defendan keenam yang telahpun selesai. Dalam tindakan sama, defendan pertama telah menuntut balas untuk serangan dan pukulan berdasarkan kejadian-kejadian yang dikatakan telah berlaku sejak 2011. Plaintif dalam tindakan ini telah memfailkan permohonan ('L 71') untuk membatalkan tuntutan balas defendan pertama menurut A 18
B k 19(1)(b), (1)(c) dan (1)(d) dan/atau A 15 k 5(2) Kaedah-Kaedah Mahkamah 2012. Isu yang timbul untuk ditentukan adalah sama ada relif yang dituntut dalam tuntutan balas defendan pertama adalah mencukupi untuk dikaitkan kepada hal perkara tuntutan utama.

C **Diputuskan,** membenarkan permohonan:

(1) Perkara yang paling utama dan penting untuk ditekankan adalah bahawa tuntutan utama dan tuntutan balas itu timbul daripada dua kejadian berbeza yang berasingan dan berbeza daripada satu sama lain. Begitu
D juga, kausa tindakan dan relif-relif yang dipohon adalah berbeza. Berdasarkan alasan-alasan berikut, defendan pertama jelas telah gagal menunjukkan bahawa tuntutan balasnya dari segi relif-relif yang dituntut dan fakta/maktriks faktual sekeliling adalah cukup mengaitkan atau mempunyai pertalian penting dengan tuntutan utama agar tuntutan
E balas dikekalkan dalam tindakan sama. Oleh demikian, defendan pertama telah gagal memenuhi ujian yang ditetapkan untuk tuntutan balas ini supaya ia kekal dari segi undang-undang (lihat perenggan 19–20).]

F **Notes**

For cases on counterclaim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9361–9367.

G **Cases referred to**

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168; [1972] 1 LNS 31 (refd)

H *High Commissioner for India and Others v Ghosh* [1959] 3 WLR 811, CA (refd)

M/S LM Ong & Co and Others v Chia Kah Gek [2009] MLJU 1093; [2009] MLJU 1094; [2010] 6 CLJ 268, CA (refd)

The Owners of the Ship or Vessel 'Siti Ayu' and 'Melati Jaya' v Sarawak Oil Palm Sdn Bhd & Anor [2006] 1 MLJ 630; [2006] 1 CLJ 126, CA (refd)

I **Legislation referred to**

Rules of Court 2012 O 15 rr 2(1), 5(2), O 18 r 19(1), O 18 r 19(1)(b), (1)(c), (1)(d)

Akberdin A Kader (Harjinder Singh Sandu and Andy Sufian with him) (Akberdin & Co) for the plaintiff.
Norazmi bin Norazman (Azmi Fadzly Maha & Sim) for the first to fourth defendants.

Gunalan Muniandy J:

[1] The plaintiff and the first defendant were once husband and wife for several years until their divorce at the Kuala Lumpur Shariah Court which was the scene of the incident giving rise to the present suit. The plaintiff's claim for defamation against the defendants has been struck out except for that against the sixth defendant which has been settled. This is an application by the plaintiff to strike out the first defendant's counterclaim pursuant to O 18 r 19(1)(b), 19(1)(c) and 19(1)(d) and/or O 15 r 5(2) of the Rules of Court 2012 ('the ROC').

BRIEF FACTUAL BACKGROUND OF CLAIM

[2] Brief facts and the chronology of this case are well summarised in the plaintiff's written submission as reproduced below:

> The Plaintiff is a renowned businessman and is the Chief Executive Officer of a few subsidiaries of the NAZA group of companies. He is also the eldest son to the late Tan Sri Nasimuddin Kamal, the owner of the NAZA Group and an iconic figure on the automobile and/or property sectors.
>
> The 1st Defendant is the ex-wife of the Plaintiff. The parties are divorced from each other but are currently resolving the other matrimonial issues such as custody etc. in the Syariah Court
>
> The Plaintiff's action was filed against the 1st Defendant and the other Defendants for the distribution of a video clip that went viral following an incident on 20.09.2016 at the Syariah High Court of Kuala Lumpur.
>
> In a nutshell, the Defendant published a video clip ('the Video Clips') of the Plaintiff taking his son into his embrace for an overnight visit with him pursuant to an order of the Syariah Court.
>
> The Video Clip, which featured the 1st Defendant and others making remarks and accompanied by captions disparaging the Plaintiff was meant to cast a bad light of the Plaintiff was made to look as if he was snatching the child away from his mother (when this was furthest from the truth).
>
> The Plaintiff then file the Writ and the SOC against the 1st Defendant and the other parties that published the Video Clip seeking recourse in defamation.
>
> The 1st Defendant however mounted a counterclaim as seen in the SOD and CC for assault and battery for incidents purportedly occurring since 2011.

On 29.05.2017, this Honourable Court struck out the Plaintiff's action under Order 18 Rule 19 Rules of Court 2012. The Plaintiff has appealed to the Court of Appeal. Be that as it may, the counterclaim appears to have survived.

Hence, the instant application.

BACKGROUND OF THE FIRST DEFENDANT ('D1'S') COUNTERCLAIM

[3] This is reproduced from D1's submission as follows:

The Plaintiff and D1 have known each other since 1994. Their relationship culminated in their marriage on 08.07.2004. They have 3 children, namely:

(1) Sheikh Mohammad Fawwaz Amin bin Sheikh Mohd Faisal ('First Child')

(2) Sheikh Mohammad Faiz Nasimuddin bin Sheikh Mohd Faisal ('Second Child')

(3) Sheikh Mohammad Farhan Kamal bin Sheikh Mohd Faisal ('Third Child').

The first few years of their marriage were normal, like any other. However, the relationship between the Plaintiff and D1 as husband and wife deteriorated from 2011 onwards, which led to their divorce on 29.01.2016.

Since 2011, the Plaintiff had become aggressive, violent and abusive towards D1. Between 2011 to 2015, D1 was subjected to various physical and mental abuse by the Plaintiff and was frequently assaulted and battered, resulting in significant bruises and physical injuries to her. Some of these abuses by the Plaintiff towards D1 even occurred in front of their children. The violence and abuse reached its peak on 22.11.2015, leading to a police report made by D1 against the Plaintiff.

Pursuant to the said police report, the Plaintiff was subsequently charged at the Kuala Lumpur Magistrates Criminal Court.

An Interim Protection Order and Protection Orders were also issued by the Kuala Lumpur Magistrates Court to protect D1 and the children from further violence by the Plaintiff.

On 20.09.2016, there was a Syariah Court proceedings between the Plaintiff and D1. It was also attended by the children and the family members of both parties.

The Judge in the Syariah Court had given an order and/or direction that the children be allowed to spend the night with the Plaintiff. The Judge further stated that the children must not be forced if they do not want to follow the Plaintiff. After that, the proceedings between the Plaintiff and D1 was adjourned for the day.

There was commotion after the proceedings in the Syariah Court was adjourned. This happened when one of the children refused to follow the Plaintiff, in which he then aggressively and forcefully took the child, among others ('Syariah Court Incident'). The Syariah Court Incident was recorded and the video clips of the said

incident went viral online.

The Plaintiff then filed the defamation action herein against the Defendants based on the video clips/recording of the Syariah Court Incident and certain statements and words accompanying the video clips.

Pursuant to the Defendants' applications at Enclosure 37, 39, 41 and 43 respectively, the Defendants sought to strike out the Plaintiff's claim. This Honourable Court allowed those applications and accordingly struck out the Plaintiff's claim on *29.05.2017*. The same is being appealed against by the Plaintiff at the Court of Appeal which is still pending.

Trial dates for the Counterclaim were set for January 2018 and parties went on to comply with the pre-trial directions.

Only about 11 months after the Counterclaim was filed did the Plaintiff decided to file Enclosure 71.

THE LAW ON STRIKING OUT OF PLEADINGS

[4] The discretion of the court in striking out pleadings where appropriate is governed by O 18 r 19(1) of the ROC. It provides that the court may at any stage of the proceedings order to be struck out any pleadings on the grounds that:

(a) it discloses no reasonable cause of action;

(b) scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is an abuse of the process of court.

[5] *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 is the leading authority on this area of the law where the Supreme Court held, inter alia, that:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.

THE LAW ON COUNTERCLAIMS

[6] The filing of counterclaims is subject to the terms stipulated in O 15 r 2(1) of the ROC which reads as follows:

> (1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relied or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.

[7] This is what O 15 r 5(2) of the ROC provides:

> (2) If it appears on the application of any party against whom a counterclaim is made that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient.

[8] The established principle as to when a counterclaim can be maintained was first adopted by the Malaysian courts in *Esso Standard Malaya Bhd v Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168; [1972] 1 LNS 31 where Raja Azlan Shah OCJ (as His Lordship then was) held:

> It is settled law that a counterclaim cannot be maintained unless it is shown that the relief claimed is sufficiently connected with or allied to the subject matter of the principal claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. Thus, a counterclaim for libel cannot be maintained in a claim for money lent (see *High Commissioner for India v Ghosh* [1959] 3 WLR 811 (1)).
>
> ...
>
> I am at a loss to see how the subject matter of the counterclaim has any material affinity at all upon the subject matter of the claim which is a claim for the price of fuel supplied. I therefore ordered the counterclaim to form the subject matter of a separate action.

[9] In *M/S LM Ong & Co and Others v Chia Kah Gek* [2009] MLJU 1093; [2009] MLJU 1094; [2010] 6 CLJ 268 the Court of Appeal accepted the *Ghosh* principle as settled law. Sulong Matjeraie JCA (later FJ) held:

> The High Court judge's dismissal of the appeal was correct but it should have been for a completely different reason. As a rule, a counterclaim must be sufficiently connected with the claim. Material affinity with the subject matter of the claim must be present in the counterclaim in order for it to survive. A counterclaim for defamation could not be maintained in an action for a claim seeking a declaration that the clause in the sale and purchase agreement providing for the retention of the proceeds of sale by a stakeholder was of no effect. In the upshot such a counterclaim should never have been filed. *Esso Standard Malaysia v Southern Cross Airways (Malaysia) Bhd* (paras 24, 25 & 26)

[10] In the same case, Gopal Sri Ram JCA (later FJ) pronounced:

... In my judgment the rule in *Ghosh* as explained in the *Esso Standard* case is still good law. It would make nonsense of RHC O 15 r 2(1) if it were to be read as permitting a counterclaim that relief which is not sufficiently connected with or allied to the subject matter of the principal claim. I would therefore overrule *Mobil Oil Malaysia Sdn Bhd v Yap Eng Hock* on this point.

[11] A different approach seems to have been adopted by the Court of Appeal in the case of *The Owners of the Ship or Vessel 'Siti Ayu' and 'Melati Jaya' v Sarawak Oil Palm Sdn Bhd & Anor* [2006] 1 MLJ 630; [2006] 1 CLJ 126 where it was held as follows:

The question that follows is: can the defendants maintain their counterclaim that is not within the admiralty jurisdiction in an action first commenced as an admiralty action, like in this case? For this, we examined O 15 r 2 of the Rules of High Court (RHC) which provides:

> The counterclaim must be one which the Court has jurisdiction to entertain as a separate action and must be for a claim for which the defendant could sue, as plaintiff, the persons against whom the counterclaim is set up.

In *Amon v Bobbett* (1889) 22 QBD 543, Bowen LJ declares:

> A counterclaim is a separate and independent action which is to be tried together with the original action.

Expanding further, the learned author in *Odgers on High Court Pleading and Practice 1* (23rd Ed) at p 243 declares:

> It (counterclaim) need not relate to or be any way connected with the plaintiffs' claim, or arise out of the same transaction. It need not be the same nature as the original action (per Fry J in *Beddall v Maitland* (1881) 17 Ch D 181) or even analogous thereto. If the defendant has any valid cause of action, legal or equitable, against the plaintiff, there is no necessity for him now to bring a cross-action, unless his counterclaim is of such a nature that it cannot conveniently be tried by the same tribunal or at the same time as the plaintiffs claim.

This statement is accepted in our courts *Shanghai Hall Ltd v Town House Hotel Ltd* [1967] 1 MLJ 223 at p 228.

From the above established legal principles, we can safely say that unless the counterclaim is of a nature that cannot be conveniently tried by the same tribunal then such claim, though not related to or by any way connected with the plaintiffs' claim or even arise out of the same transaction or of the same nature as the plaintiffs' claim, can be maintained in the same action.

See also: pp 206–209 of the *Malaysian Court Rules 2012 an Annotation* (Vol 1, LexisNexis).

[12] It is all important that there must be a commonality between the reliefs sought in the principal claim and the counterclaim for the latter to

be maintained in the same action. In *High Commissioner for India and Others v Ghosh* [1959] 3 WLR 811, Jenkins LJ in the English Court of Appeal concluded:

> Accordingly I am of the opinion that this counterclaim cannot be maintained unless it is shown to be, as regard the relief if claims, sufficiently connected with or allied to the subject-matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim.

FINDING

[13] There has, undoubtedly, been some delay in the filing of this application (L 71) since the close of pleadings on 30 December 2016. However, while unreasonable delay is an important factor in determining an application of this nature it is by no means the sole factor, in particular where a point of law is raised, which is the case here where the plaintiff contends that the counterclaim ('C/C') is wrong and not maintainable in law. An issue of law raised at any stage of the proceedings that affects the validity of the proceedings must be considered by the court and determined on its merits regardless of whatever delay there was in filing the application.

[14] The law is settled as to the criteria that a defendant has to meet for his C/C to be filed and maintained in the same action and as to when it cannot in law be maintained or sustained. Ultimately, the test boils down to whether the relief claimed in the C/C was sufficiently connected with or allied to the subject matter of the principal claim.

[15] The first defendant placed much reliance on the Court of Appeal decision on *Siti Ayu* and contended in essence that:

> it is trite law that even if a counterclaim is not directly related or connected with the plaintiff's claim, the counterclaim can still be maintained as long as it is conveniently tried by the same court. Is such is the position of law, D1 would have a stronger position here, as her counterclaim is premised on facts which were pleaded as defence to the plaintiff's original action herein — therefore, the reliefs sought by D1 are sufficiently connected to the subject matter in the plaintiff's original action.

[16] It was also contended by D1 that the plaintiff's original action was already struck out way back on 29 May 2017 following which pre-trial directions had been given for the C/C after which trial dates were fixed for January 2018. Both parties proceeded to comply with the said directions right up to the final stage without any objections from the plaintiff.

[17] L 71 was commenced approximately 11 months after the filing of D1's C/C and approximately five months after the plaintiff's original action was

struck out. Hence, D1 argued that L 71 could not be genuine as if it was so, it would have been filed back in November 2016 when the C/C was first filed. Instead, there appeared to be an ulterior motive on the part of the plaintiff to avoid or delay the C/C going to trial. Further, that if the C/C were to be struck out at this stage, the result would be a waste of precious judicial time and costs being incurred by D1 to initiate a fresh action. As such, that the plaintiff should be prevented from abusing the court process in this unjust manner.

[18] I have carefully considered the pleadings in relation to the principal claim and C/C together with the contentions of counsel on behalf of both parties.

[19] The first and most important point to note is that the principal and counter claims arise out of different incidents which are separate and distinct from each other. While P's action against the first and other defendants ('D1 and D2–D6') arose wholly from an incident that occurred on 20 September 2016 outside the Kuala Lumpur Shariah High Court ('KLSHC') the C/C is based entirely on incidents involving P and D1 that allegedly occurred since 2011 predating the 2016 incident. Likewise, the causes of action and reliefs prayed for are entirely different. While the principal action is for the tort of defamation, the C/C is for assault and battery. It cannot be said that both the causes of action are founded on the same set of facts or substantially similar facts and the reliefs claimed are sufficiently connected.

[20] From the above grounds, inter alia, there can be no other conclusion except that D1 has clearly failed to demonstrate that her counterclaim in terms of the reliefs claimed and surrounding facts/factual matrix is sufficiently connected to or has material affinity with the principal claim for the C/C to be maintained in the same action. I, therefore, find that D1 has failed to satisfy the establish test for the present C/C to be sustainable in law.

[21] In view of my finding that it is abundantly clear that the C/C is unsustainable and untenable in law on the aforesaid threshold issue, I do not propose to deliberate on the plaintiff's second important contention that the facts on which the present C/C is based are essentially a duplicity of the Kuala Lumpur High Court Civil Suit 22NCVC-668–12 of 2015 which was then already scheduled for trial before the learned judge.

[22] I, accordingly, allow L 71 to strike out D1's C/C on the above mentioned grounds and grant an order in terms of L 71 prayers (a) and (b). Each party ordered to bear their own costs. Trial dates vacated.

A *Application allowed.*

Reported by Dzulqarnain Ab Fatar

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